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IN THE

SUPREME COURT of the UNITED STATES

Spring Term, 1978

No. 77-1595

STATE OF WASHINGTON,
Respondent

vs.

WILLIAM E. COSDEN, JR.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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WARREN'S PRINTING — OLYMPIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above cause on February 17, 1978 denying a Petition for Review and sustaining the decision of the Court of Appeals of the State of Washington, Division II entered on July 20, 1977.

I.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of the State of Washington, Division II attached hereto as Appendix A is reported as *State v. Cosden*, 18 Wn.App. 213 ____ P.2d ____, (1977).

The Order of said Court of Appeals denying the motion for reconsideration is attached hereto as Appendix B.

The Order of the Supreme Court of the State of Washington denying the Petition for Review is attached hereto as Appendix C.

II.

JURISDICTION

1. The decision and judgment of the Court of Appeals of the State of Washington, Division II was entered on July 20, 1977.

2. The Order Denying the Motion for Reconsideration was entered by said Court of Appeals on August 26, 1977.

3. The Order of the Supreme Court of the State of Washington denying the Petition for Review was entered on February 17, 1978.

4. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3) providing for re-

view by Writ of certiorari where the validity of a State statute is questioned on the ground that it is repugnant to the Constitution of the United States or where any title, right, privilege or immunity is set up or claimed under the Constitution of the United States.

III.

QUESTIONS PRESENTED

1. Was the Petitioner deprived of constitutional rights guaranteed to him by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution by the lower courts' refusal to allow admission of evidence at trial that the complaining witness in a prosecution for rape had engaged in sexual intercourse with an individual other than the Petitioner four days prior to the alleged rape?

2. Was the Petitioner deprived of constitutional rights guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution by the trial court's (a) refusal to prohibit the prosecution from questioning Petitioner and the arresting officer concerning the Petitioner's silence following his receipt of the Miranda warning; and (b) allowance of the prosecutor's comments upon such silence during the prosecutor's closing argument to the jury.

IV.

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Constitution of the United States, Amendment XIV, Section 1.:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V.

STATEMENT OF THE CASE

A. NATURE OF ACTION

The Petitioner, Defendant below, seeks to reverse the final decision of the Supreme Court of the State of Washington sustaining the Court of Appeals of the State of Washington, Division II, sustaining a judgment of the Superior Court of the State of Washington for Thurston County wherein the Defendant was convicted of the crime of rape in the first degree.

B. PLEADINGS AND PROCEEDINGS

The Petitioner was accused of the crime of rape as charged in the criminal information filed with the Superior Court of the State of Washington for Thurston County on December 3, 1975. He was subsequently accused of the crime of first degree rape as set forth in amended information filed on February 9, 1976. The Petitioner pleaded not guilty to the charge and was tried thereon. A verdict of guilty was entered on February 18, 1976. The Petitioner was thereafter sentenced on March 15, 1976, to a term of 48 years in the Washington State Penitentiary.

The Petitioner appealed to the Court of Appeals of the State of Washington, Division II, which affirmed the trial court's judgment on July 20, 1977. *State v. Cosden*, 18 Wn.App. 213, ___ P.2d ___, (1977) (Appendix A). The Pe-

titioner moved for reconsideration which motion was denied on August 26, 1977. (Appendix B). Thereafter, the Petitioner petitioned the Supreme Court of the State of Washington, for review. (Appendix D). Said Petition was denied by an Order entered by the Supreme Court on February 17, 1978. (Appendix C). This Petition for Writ of Certiorari followed.

C. STAGE WHERE FEDERAL QUESTIONS RAISED

The federal questions presented by this Petition for Writ of Certiorari were first raised during the trial of the action in the Superior Court of the State of Washington for Thurston County. These issues were renewed before both the Court of Appeals of the State of Washington Division II and the Supreme Court of the State of Washington.

D. STATEMENT OF FACTS

1. Facts relative to Question 1.

During the early morning hours of November 30, 1975, the Petitioner and the complaining witness travelled in Petitioner's vehicle to an area in the vicinity of Maytown, Washington. Petitioner testified that the complaining witness accompanied him willingly. The complaining witness testified that she accompanied the Petitioner as a result of physical force and threats.

The complaining witness testified that, while at the Maytown location, the Petitioner engaged in two acts of non-

consenting intercourse with her. The Petitioner testified that he attempted to engage in such intercourse with the consent of the complaining witness, but was unable to perform due to impotence.

Approximately twelve hours after the alleged intercourse the complaining witness received a medical examination and samples taken from her vaginal cavity were placed on slides. A pathological examination of the slides revealed the presence of non-motile (dead) sperm. Several weeks later, the FBI laboratory identified sperm on articles of clothing worn by the complaining witness at the time of the alleged rape.

Testimony at trial established that neither the sperm found in the complaining witness' vaginal cavity nor the sperm found on her clothing prove the alleged intercourse between the complaining witness and the Petitioner. Petitioner's medical witness, an expert specializing in forensic pathology, testified that sperm deposited on a clean item of clothing can be identified several years after deposit. Petitioner's medical expert further testified (i) that sperm deposited in the female vaginal cavity will remain motile (alive) for twelve to fourteen hours and that he had observed motile sperm three to four days after such deposit; and (ii) that non-motile (dead) sperm can be detected in the female vaginal cavity as long as three weeks after deposit.

Petitioner's medical expert testified, based upon an examination of the medical slides and reports, that in his opinion the objective findings were not consistent with the allegation that the complaining witness had engaged in sexual intercourse within twelve hours prior to the medical examination.

During a discovery examination prior to trial, the complaining witness admitted that she had engaged in sexual intercourse on at least one occasion with a third person around November 26, 1975. Thus, the sperm found in the complaining witness' vaginal cavity and her clothing could have resulted from the act or acts of intercourse occurring prior to the alleged rape and admission of this evidence could have exonerated the Petitioner.

The trial court refused to allow Petitioner to introduce evidence of the complaining witness' prior acts of intercourse and refused to allow Petitioner's counsel to interrogate the complaining witness with respect to such prior acts of intercourse.

2. Facts relative to Question 2.

Following his arrest, the Petitioner complied with a police request that he furnish samples of hair from various parts of his body. After Petitioner had been read the Miranda rights, he made a few comments to the arresting officer and then chose to remain silent. Over Petitioner's objection, the

prosecution was allowed to advise the jury of the Petitioner's post-Miranda warning silence, by questions asked during cross-examination and rebuttal, and by comments made during the final argument, including the following:

> "I submit, ladies and gentlemen, maybe he really hadn't concocted his story yet. That is why he didn't want to tell Detective Barclift anything. The Detective would have seen right through it."

VI.

ARGUMENT

1. Exclusion of Evidence:

The trial court refused to allow any interrogation of the complaining witness with respect to her prior acts of sexual intercourse, holding that such evidence was inadmissible by virtue of the provisions of Revised Code of Washington Section 9.79.150, which provides, in part, as follows:

> "Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.
>
> In any prosecution for the crime of rape or for an

> attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissble on the issue of consent only pursuant to the following procedure: . . ."

The Court of Appeals of the State of Washington, Division II, held the trial court was incorrect in its reason for the exclusion of this evidence, but held further that the evidence was inadmissible due to relevancy.

The Fifth Amendment to the United States Constitution provides, in part, that no person shall be deprived of life, liberty or property without due process of law. The Sixth Amendment of the United States Constitution provides, in part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;"

These Constitutional rights are applicable to states by virtue of the provisions of the Fourteenth Amendment to the United States Constitution.

Bonner v. Beto, 373 F.2d 301 (5th Cir. 1967) involved examination of Article 711 of the Texas Code of Criminal procedure, which declared co-principals incompetent to testify on behalf of a principal. Defendant Bonner and his wife were indicted separately in the state courts of Texas

for the same burglary. Immediately prior to Bonner's trial, his wife pleaded guilty and was given probation. When Bonner attempted to call his wife as a witness at trial, the state trial judge refused to allow her to testify.

On review, the Federal Court stated in part as follows:

> "The Fourteenth Amendment leaves Texas free to adopt whatever statute or decision she elects concerning the competency of various classifications of witnesses to testify, whether or not her rule conforms to that applied in the Federal Courts or in other state courts. But as the Supreme Court said in *Lisenba v. People of the State of California*, 315 U.S. 219, 62 S. Ct. 280, 86 L.Ed. 166 (1941), '(T)he adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. 314 U.S. at 236, 62 S.Ct. at 290.
>
> The district court held that because the testimony of Bonner's wife was self-serving, its prohibition was a reasonable policy and was consistent with the Fourteenth Amendment. We disagree and view the determination of the credibility of a witness' testimony as a function of the jury.
>
> We hold that the application of Article 711 of the Vernon's Ann. Texas Code of Criminal Procedure to Bonner worked a deprivation of his liberty without due process of law under the Fourteenth Amendment."

Bonner, 373 F.2d 301, at 304.

The Federal court reversed the judgment of the Texas district court and remanded the cause with directions giving the State of Texas a reasonable time within which to grant Bonner a new trial and, failing the grant of a new trial, directing that a writ of habeas corpus would issue.

Smith v. Illinois, 390 U.S. 129, 19 L.Ed. 2d 956, 88 S.Ct. 748 (1968) involved the refusal of a trial court to require a prosecution witness to disclose his true name and address. The witness, was an informant, who alleged that he had purchased a bag of heroin from the defendant. The witness identified himself on direct examination as "James Jordan", which was a fictitious name. The trial court sustained the prosecution's objection to the questions requiring the witness to disclose his true name and address.

On review, this Court noted, in part:

> "In *Pointer v. Texas,* 380 U.S. 400, 403, this Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a 'fundamental right . . . made obligatory on the States by the Fourteenth Amendment.' "

Smith v. Illinois, supra 390 U.S. at 129.

> "As the Court said in *Pointer,* 'It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.' 380 U.S., at 404. Even more recently we have repeated that 'a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amoun of showing of want of prejudice would cure it.' *Brookhart v. Janis,* 384 U.S. 1, 3."

Smith v. Illinois, supra, 390 U.S. at 131. This Court held that the defendant/petitioner had been deprived of a right guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution and reversed the trial court.

In *Davis v. Alaska,* 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1973), this Court reviewed a state court's grant of a protective order in favor of a prosecution witness preventing any reference to the prosecution witness' juvenile record by the defense in the course of cross-examination. The state trial court granted the motion for a protective order in reliance upon Alaska Rule of Children's Procedure 23, and Alaska Statutes Section 47510.080(g).

This Court stated, in part, as follows:

> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas,* 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama,* 380 U.S. 415, 418 (1965). Professor Wigmore stated:
>
> > 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' 5 J. Wigmore, Evidence § 1395, p. 123 (3d. ed. 1940). (Emphasis in original.)
>
> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only per-

mitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' "

Davis v. Alaska, supra, 415 U.S. at 315-316.

With respect to Alaska's claim of that state's interest in protecting the anonymity of juvenile defenders, this Court observed:

> "The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwith suffer unnecessarily for his youthful transgression.

> We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault,* 387 U.S. 1, 25, (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record —if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.
>
> In *Alford v. United States, supra,* we upheld the right of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as 'given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States.' 282 U.S., at 693. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:
>
> > '(N)o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitution protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.' Id., at 694.
>
> As in *Alford,* we conclude that the State's desire that

Green fulfill his public duty to testify free from embasassment and with his reputation unblemished must fall before the right of petitioner to seek out the tru h in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records."

Davis v. Alaska, supra, 415 U.S. at 319-20. This Court reversed the conviction of petitioner Davis.

The Sixth Amendment secures more than the mere physical attendance of a witness at a trial. *Washington v. Texas,* 388 U.S. 14 (1967) involved the constitutionality of Texas statute which provided, in effect, that persons charged or convicted as co-participants in the same crime could not testify for one another, although there was no bar to their testifying for the state. This Court concluded:

"We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to

secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed."

Washington v. Texas, supra, 388 U.S. at 23.

The textwriter of 29 Am.Jur.2d *Evidence,* Section 252 states:

"Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical and reasonable inference with respect to the matter or a principal fact in issue, is relevant."

See, Williams v. Vreeland, 250 U.S. 295, 63 L.Ed. 989, 39 S.Ct. 438, 3 A.L.R. 1038 (1919).

Petitioner submits that the above rule is the rule applied in the State of Washington, although not applied in this case. In discussing the question or relevancy, the Court of Appeals of the State of Washington, in *State v. Gray,* 3 Wn.App. 146, 473 P.2d 189 (1970) states:

"The issue of materiality must be determined not just on the item of evidence alone, but on the basis of whatever inferences were made from it when it was viewed in connection with other evidence in the case. The cogency and degree to which it elucidates the facts in issue determine the weight to be given it by the trier of the fact."

State v. Gray, supra, 3 Wn.App. at 149-50.

In the instant case, the trial court subordinated the Petitioner's rights as guaranteed by the Constitution of the United States to what the trial court determined to be the interest of the complaining witness in avoidance of personal embarassment to her. The Court of Appeals of the State of Washington and the Supreme Court of the State of Washington refused to reverse the trial court's error in denying the Petitioner his constitutional rights to confront the witnesses presented against him.

2. Prosecution's Comment on Defendant's Silence After Arrest:

Petitioner submits that his rights guaranteed by the Due Process Clause of the Fourteenth Amendment, were violated by introduction to the jury of the fact of his post-Miranda warnings silence.

Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91 (1976) involved the question of whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examination of the defendant concerning his failure to have told the story after receiving his Miranda warnings at the time of his arrest. This Court stated as follows:

> "Despite the importance of cross-examination, we have concluded that the Miranda decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding

> Fifth Amendment rights, see *Michigan v. Tucker*, 417 U.S. 433, 443-444, 41 L.Ed.2d 182, 94 S.Ct. 2357 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to be retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See *United States v. Hale*, 422 U.S., at 177, 45 L.Ed.2d 99, 95 S.Ct. 2133. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. Mr. Justice White, concurring in the judgment in *United States v. Hale*, 422 U.S., at 182-183, 45 L.Ed.2d 99, 95 S.Ct. 2133, put it very well:
>
> '. . . when a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, and unfavorable inference might be drawn as to the truth of his trial testimony . . . Surely Hale was not informed here that his silence, as well as his words could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case.'
>
> We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after re-

ceiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment."

Doyle v. Ohio, supra, 49 L.Ed.2d at 97-98.

In the instant case, Petitioner made a few comments to the arresting officer after being advised of his Miranda rights, but did not advise the officer of his inability to consumate sexual intercourse with the complaining witness because of his impotence. It is not difficult to imagine why an accused in the position of the Petitioner would hesitate to discuss his lack of virility with a law enforcement officer. Yet, the Defendant's very understandable silence became a central theme of the prosecutor's attack, and was used repeatedly and invectively during the prosecutor's final argument.

The permitted questioning of Petitioner and the arresting officer concerning Petitioner's post-Miranda warning silence, and the repeated comment thereon by the prosecutor violated Petitioner's rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States.

VII

CONCLUSION

The courts below have deprived the Petitioner of the rights guaranteed to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The decision of the Supreme Court of the State of Washington which affirmed the decision of the Court of Appeals of the State of Washington, Division II should be reversed and this matter should be remanded to the Superior Court of the State of Washington for Thurston County for a new trial.

DATED at Olympia, Washington this day of April, 1978.

Respectfully submitted,

FRISTOE, TAYLOR & SCHULTZ, LTD., P.S.

By

DON W. TAYLOR AND CLIFFORD L. STILZ, JR.

Attorneys for Petitioners.

APPENDIX A

[FILE
In Clerk's Office
Court of Appeals
State of Washington-Division II
Date July 20, 1977
/s/ PETRIE
Chief Judge]

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,
v.
WILLIAM E. COSDEN, JR.,
Appellant.

PR-37
No. 2332-II
Division Two

Filed July 20, 1977

PEARSON, J.—Defendant William Cosden, Jr., appeals from a conviction of first-degree rape under RCW 9.79.150, the relatively new rape statute. The principal issue on appeal is whether prejudicial error occurred when the trial court excluded evidence offered by the defendant that the complaining witness had engaged in sexual intercourse with another man approximately 4 days prior to the alleged rape. We hold the exclusion was not reversible error under the facts and circumstances of this case.

The facts concerning the alleged rape are as follows. Defendant and the complaining witness encountered one another at the Rest Over truck stop in rural Thurston County in the early morning hours of November 30, 1975. They had not previously met. The witness was en route to her rural

home, driving her parents' four-wheel-drive Dodge pickup truck, and had stopped for gas at the station. There was heavy ice and snow on the roads which made driving extremely difficult. Defendant, an employee of the station, was engaged that evening in rendering assistance to vehicles which had difficulty because of adverse road conditions.

At the station, defendant, who lived in the vicinity of the witness, offered to follow her home in his 1961 one-ton Dodge truck in the event she had difficulty driving. She declined the offer. He testified she accepted the offer. Defendant did follow her as she left the station.

After leaving the truck stop, the witness drove east on Lathrop Road approximately a mile and a half to the intersection of Case Road, where her vehicle began to slide into the ditch. She got out to put it into four-wheel drive, and was surprised to see defendant come up behind her in his truck. He again offered assistance. She claimed the offer was refused. He claimed he assisted in placing her vehicle in four-wheel drive.

Testimony of the two parties was in sharp dispute as to events after leaving the intersection of Lathrop and Case Roads. Both vehicles proceeded south on Case Road. Defendant testified that the complaining witness stopped her vehicle in the middle of the intersection of Case Road and 101st Street, for no apparent reason. Defendant stopped behind her. She got out of her vehicle, slipped and fell on

the ice, and then walked back to the defendant's vehicle and told the defendant she wanted to talk with him. She got into his truck and asked him if they could go some place where they could be alone. He then told of driving to an isolated place, where her attempts to seduce him were unsuccessful because he became psychologically impotent.

On the other hand, the victim's version told of violence culminating in rape. She testified that she saw the lights of his truck following her as they left the Lathrop-Case Road intersection to proceed south on Case Road. Approximately 1 mile south, she noticed in the rear-view mirror that defendant's truck was no longer following her. It appeared to have gone into a ditch. She backed up her vehicle to the 101st Street intersection, and left it in the middle of the intersection with the lights on and the motor running. She walked back to the truck to see if defendant needed help. Defendant asked her to drive the truck while he pushed it out of the ditch. The truck came out of the ditch without difficulty. As she started back to her vehicle, she was struck on the back of the neck and knocked to the ground. Defendant was standing over her, menacing her with a heavy rubber mallet. She was then forced into the truck, driven to an isolated place, ordered to take off all her clothes, and was raped twice during the next half hour. At one point she was choked. After making some threats, defendant finally drove her back to her vehicle. The engine was still running. She

drove home, took a bath, slept for a time, and then reported the incident to the sheriff's office at about 4 a.m.

Much of the physical and scientific evidence supported the complaining witness' version of the incident. There were bruises and contusions on her body consistent with her version of violence. Sperm and hair were found on defendant's coveralls, and the hair was microscopically alike in all particulars to that of the victim. Sperm was also found on the victim's panties and panty hose. A pathologist from the hospital where the victim was examined testified that specimens taken from the victim's vagina on the morning of November 30, 1975, and preserved on slides showed evidence of sperm. This witness concluded that intercourse had taken place within 12 hours prior to obtaining the specimens. All of this evidence tended to dispute defendant's claim that no intercourse had occurred.

Furthermore, other witnesses observed the victim's car at the intersection of Case Road and 101st Street, with lights on and engine running. The victim also led officers to the scene of the alleged rape where they found certain items which she had thrown from the window of defendant's truck during the incident.

On the other hand, defendant's expert medical witness, Dr. Gale Wilson, who viewed the same slides on which the State's expert opinion was based, testified that the slides contained only "very, very occasional sperm." This indi-

cated to him that intercourse must have taken place more than 12 hours prior to taking the smears. The doctor further testified that sperm may remain in the vagina for several days after intercourse. On cross-examination, Dr. Wilson conceded the minute number of sperm could have been consistent with a more recent sexual contact if a douche or thorough washing had taken place prior to obtaining the smears.

To corroborate Dr. Wilson's testimony, and to explain away the presence of sperm found in the victim, defendant offered at a pretrial hearing to prove through the victim's own testimony that she had engaged in sexual intercourse with another man on November 26, 1975, some 4 days prior to the alleged rape. Defendant claims this offered evidence was directly relevant to the material issue of whether or not defendant had engaged in intercourse with the victim. The trial court ruled the evidence inadmissible, concluding that RCW 9.79.150[1] allowed the evidence under limited circumstances only when relevant to the issue of consent. It is our view that the reasons given by the trial court for rejecting the evidence are erroneous, but refusal to allow the evidence was not an abuse of discretion under the facts and circumstances of this case.

1. RCW 9.79.150 provides in part:

"(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is admissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue on consent to the offense.

"(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

"(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

The trial court assumed, incorrectly we think, that evidence of prior sexual behavior of a prosecuting witness in a rape case may be allowed under RCW 9.79.150 only on the issue of consent, and within the guidelines prescribed in subsection (d). The statute deals specifically with admissibility of prior sexual behavior of a rape victim on the issue of consent, allowing the evidence under narrowly defined circumstances within the discretion of the trial judge. Such prior sexual behavior is rendered inadmissible under all circumstances to attack credibility of the victim. To this extent the statute was both a codification and a clarification

of the prior case law which had considered the relevancy of this type of evidence to both credibility and consent. *State v. Geer*, 13 Wn. App. 71, 533 P.2d 389 (1975); *State v. Allen*, 66 Wn.2d 641, 404 P.2d 18 (1965). The purpose of the statute, like the rationale of the prior cases dealing with this subject, is to encourage rape victims to prosecute and eliminate prejudicial evidence which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent. *State v. Geer, supra.*

But neither the prior case law nor the statute purports to establish a blanket exclusion where the purpose of the evidence is highly relevant to other issues which may arise in prosecutions of rape. *See State v. Simmons*, 59 Wn.2d 381, 368 P.2d 378 (1962); *State v. Geer, supra.* The case at bench affords an example.

Where the defendant denies any sexual contact with the victim, yet the post-rape medical tests show evidence of a recent sexual contact, then all recent sexual contacts which could account for those testing results become highly relevant on the issue of the defendant's responsibility for the crime. And it would be unfair to deprive defendant of the right to show the test results are not necessarily inconsistent with his denial of sexual intercourse with the victim.

Normally, evidence of a single act of sexual intercourse by the victim of rape within a short period of time prior to the alleged crime will not be so highly prejudicial or in-

flammatory as to outweigh its probative value, where expert evidence establishes that such a contact could from a reasonable medical probability account for the sperm shown by the post-rape testing procedure.

Whether the evidence should be allowed on this issue requires the exercise of discretion by the trial court based upon the balancing process of the sort described in RCW 9.79.150(d), namely, whether its probative value is substantially outweighed by the danger of undue prejudice. Necessarily, the offer of proof must be specific and a proper medical foundation must be made in the offer of proof to establish the probative value of the testimony.

In the case at bar, the offer of proof stated only: "I offer to prove that if permitted to examine the complaining witness [name omitted] would state that on November 26, 1975, she had sexual intercourse with a friend which relationship was successfully completed."

Dr. Wilson's evidence was not included in the offer of proof, nor was his testimony sufficiently specific at trial to establish the necessary foundation. Dr. Wilson was not asked by hypothetical question or otherwise whether a 4-day-old contact would in terms of reasonable medical probability account for the presence of the quantity of sperm shown on the slides.[2] Furthermore, Dr. Wilson's testimony that a

2. We note there was no attempt to voir dire Dr. Wilson out of the presence of the jury, to lay a proper foundation for his opinion.

douche or thorough washing could account for the "very, very occasional sperm," coupled with the victim's testimony of taking a bath prior to the hospital tests, greatly weaken the probative value of the offered testimony. Also, the offered evidence, while it might tend to explain away the sperm taken as a result of the pelvic examination, would not explain away the presence of sperm on defendant's overalls, nor on the victim's panties and panty hose. In short, the probative value of the evidence was weak and nonpersuasive in light of all the other facts and circumstances of this case. and the foundation evidence insufficient. Accordingly, we hold there was no abuse of discretion in refusing to allow the evidence. We note also that defendant was not precluded from contending that Dr. Wilson's opinion evidence corroborated his defense.

Defendant raises two other assignments of error which we now consider. After defendant's arrest, he was given the *Miranda* warnings. Nevertheless, he commented to the police that he had not been with any women on the night in question and then exercised his right to remain silent. At trial the deputy prosecutor cross-examined defendant regarding his exercise of his right to remain silent, examined a deputy sheriff concerning defendant's silence, and commented on the subject of defendant's silence in closing argument. Defendant contends this use of defendant's post-arrest silence violated the due process clause of the Fourteenth Amendment. *State v. Upton*, 16 Wn. App. 195, 556 P.2d 239 (1976).

It is true that *State v. Upton, supra*, and *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 97, 96 S.Ct. 2240 (1976), hold that the unequivocal post-arrest assertion of the Fifth Amendment right to remain silent may not be used to impeach the defendant's testimony at trial. The rationale of the ruling is that the unequivocal post-arrest assertion of the right is "insolubly ambiguous," and does not necessarily tend to show a fabricated defense. *Doyle v. Ohio, supra.*

But in the case at bench there was not an unequivocal post-arrest assertion of the right to remain silent after the *Miranda* warnings were given. Here defendant volunteered a defense to the police wholly inconsistent with the one interposed at trial, namely, that he had not been with a woman on the night in question. Hence, the fact of his failure to relate the defense of seduction and psychological impotence to the police is not insolubly ambiguous where he later asserts that defense at trial. Under those circumstances his partial silence strongly suggests a fabricated defense and the silence properly impeaches the later defense. *See Doyle v. Ohio, supra.*

Finally, defendant urges as error the reasonable doubt instruction given by the court, as well as the refusal of the trial court to give one of those proposed by defendant. We find no error. A reasonable doubt instruction identical to the one given by the trial court was upheld in *State v. Thompson*, 13 Wn. App. 1, 533 P.2d 395 (1975).

Affirmed.

/s/ PEARSON, J.

WE CONCUR:

/s/ PETRIE, C. J.

/s/ REED, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

THE STATE OF WASHINGTON, *Respondent,*	No. 2332-II
v.	Order Denying
WILLIAM E. COSDEN, JR., *Appellant.*	Motion for Reconsideration

The court has considered this motion for reconsideration and has determined that it should be denied. Accordingly, it is

ORDERED that the motion is denied.

DATED this 26th day of August, 1977.

/s/ HAROLD J. PETRIE
Chief Judge

cc. DON W. TAYLOR
PATRICK D. SUTHERLAND
Clerk of Supreme Court
Reporter of Decisions

ORDER DENYING MOTION
FOR RECONSIDERATION

APPENDIX C

THE SUPREME COURT
State of Washington
Olympia
98504

February 17, 1978

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Counsel:

Re: Supreme Court No. 45137—State v. Cosden, Jr.
Court of Appeals No. 2332-II

Following consideration of the above entitled Petition for Review on February 17, 1978, the following notation order was entered on page 20, Vol. 1, of the petition for review docket:

"DENIED"

/s/ CHARLES T. WRIGHT
Chief Justice

Very truly yours,
John J. Champagne
Clerk

JJC:aje
cc: Honorable David Gordon, Clerk
Division II, Court of Appeals

APPENDIX D

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

WILLIAM E. COSDEN, JR.,
Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER:

William E. Cosden, Jr., the Appellant, asks this Court to accept review of the Court of Appeals Division Two Decision Terminating Review designated in Part B. of this Petition.

B. COURT OF APPEALS PETITION:

A copy of the Decision of the Court of Appeals, Division Two is set forth in the Appendix attached hereto at pages A1 through A8. A copy of the Order of the Court of Appeals Denying Motion for Reconsideration is set forth in said Appendix at page A9.

C. ISSUES PRESENTED FOR REVIEW:

1. Did the refusal of the trial court as affirmed by the Court of Appeals, to allow the admission of evidence pertaining to prior acts of sexual intercourse on the part of the complaining witness with other persons during the period of time intervening between November 26, 1975 and November 30, 1975, deprive the Appellant-Petitioner of his constitutional rights as guaranteed to him by the Fifth, Sixth and Fourteenth Amendment to the United States Constitution and the Tenth Amendment to the Washington State Constitution.

2. Did the trial courts allowance of questions of the Defendant (Appellant-Petitioner) and the arresting officer with respect to the Defendant's post-Miranda warning silence and the prosecutor's comments thereon constitute a

violation of the Defendant's constitutional rights as guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution.

D. STATEMENT OF CASE:

The Defendant was accused of the crime of rape as charged in an Information filed with the Thurston County Superior Court on December 3, 1975. (CP 1-2) He was subsequently accused of the crime of first degree rape as set forth in the First Amended Information filed on February 9, 1976. (CP 16-17.) The Defendant pleaded not guilty to the charge and was tried thereon. A verdict was entered adverse to the Defendant on February 18, 1976. (CP 87.) The Defendant was thereafter sentenced on March 15, 1976. (CP 94-95.)

The complaining witness, Beverly Fredericks, met the Defendant in the early morning hours of November 30, 1975. (RP 240, 390.) She had been on a dinner and dancing date with a male companion earlier that evening and was returning to her residence. (RP 233-235.) She stopped for gas at the Restover Truck Stop located at the Lathrop Road exit from Interstate Freeway 5 south of Tumwater. The weather was bad and it had been snowing. The roads were slick. (RP 239, 388, 389.) The Defendant was at the Restover Truck Stop when the complaining witness arrived. The Defendant lived in the same general area as the complaining witness. The Defendant's residence was somewhat south

of the complaining witness's residence. (RP 241, 393.) After obtaining gas for her vehicle, the complaining witness left the Restover Truck Stop proceeding East on The Lathrop Road. (RP 241, 394) The Defendant followed her in his vehicle. At the intersection of the Lathrop Road and the Case Road, the complaining witness' vehicle slid into a ditch. (RP 242, 243, 396.) The Defendant assisted the complaining witness in placing her vehicle into four-wheel drive, which was done by turning the hubs of the front wheels. (RP 397). The complaining witness backed her vehicle out of the ditch, turned right, and proceeded south on the Case Road. (RP 246, 397.) The parties stopped at the intersection of the Case Road and the Nunn Road. (RP 398.) The Plaintiff left her vehicle at this intersection, got into the Defendant's vehicle and the two proceeded in the Defendant's vehicle to the area of Maytown. (RP 247-254.) Later that morning, the Defendant returned the complaining witness to her vehicle at the intersection of Case and Nunn Roads. (RP 275, 472.)

There is a dispute in the testimony with respect to what happened at the intersection of the Nunn Road and Case Road and what happened at Maytown. The complaining witness maintained that the Defendant's vehicle slid into the ditch and that she assisted the Defendant in getting the vehicle out. She further maintained that the Defendant struck her with a rubber mallet knocking her to the ground and that she thereafter got into the Defendant's truck. (RP 247-254.) The Defendant denied all of these contentions.

(RP 398, 448, 449.) An examination by Lieutenant Bason of the mallet that was found in the Defendant's vehicle the next day failed to reveal any fingerprints, hairs or fibers thereon. Lieutenant Basen had been employed fourteen and one-half years with the Thurston County Sheriff's Office and had twenty-four years experience with respect to examination of fingerprints. (RP 131.)

There is a further dispute in the testimony as to what occurred while the Defendant and the complaining witness were in the Maytown area. The complaining witness contended that the Defendant had intercourse with her twice. The Defendant denied any intercourse whatsoever with the complaining witness. (RP 264-266, 400, 464, 465).

The Defendant attempted to show, but was prevented by the trial court from so doing, that the complaining witness had intercourse with another person prior to the time she maintained she had intercourse with the Defendant. (RP 5-24, 43, 55, 358, 607, and 364 of Proceedings of March 9, 1976). There is no dispute that the complaining witness had engaged in intercourse with someone, since sperm was found in her vaginal cavity upon clinical examination. This examination included the removal of samples, and the incorporation of the same into slides, one of which was a wet mount. (RP 160, 177 and 178) The slides were examined by Dr. Shulte, a pathologist called as a witness by the prosecution. The findings on examination revealed sperm. (RP 216)

There was no finding that any of the sperm were motile (RP 217) *i.e.* alive. Various items of clothing were examined at the FBI laboratory twenty days after the articles were received by the laboratory. Upon examination, sperm was identified upon the articles. The fact is not unusual. (RP 207, 28) Sperm can be identified several years after deposit on a clean item. (RP 209)

The Defendant called as an expert witness Dr. Gale Wilson, a doctor of medicine specializing in forensic pathology. Prior to testifying, Dr. Wilson had the opportunity to examine certain slides which had been admitted into evidence as Plaintiff's Exhibit No. 54. These are the slides mentioned in the preceding paragraph. Dr. Wilson also examined the reports from St. Peter Hospital and other exhibits admitted into evidence. Dr. Wilson testified that the sperm upon a slide will remain preserved (identifiable) literally forever. He stated that under ordinary circumstances sperm will remain alive for at least up to twelve to fourteen hours within the vagina and that he had observed sperm alive three or four days later. (RP 416) In response to a question pertaining to the presence of dead sperm in the vagina, Dr. Wilson stated in part as follows:

> A. Well, yes; they remain alive for many hours, many hours and then die; but they may still be there. Of course, individual—I used to see many cases of homicide rape, you could find sperm two or three weeks later within the vagina." (RP 417)

Upon examining the slides, Dr. Wilson was of the opinion

that the slides showed very, very occasional sperm. (RP 422) This finding is consistent with Exhibits 51 and 52, which were the reports of St. Peter Hospital pertaining to examinations of the complaining witness. Both reports referred to "few sperm seen" and "occasional sperm seen". (RP 226, 227, 422-425) After considering all of the evidence submitted by the trial court, Dr. Wilson was of the opinion that the objective findings were not consistent with the proposition that the complaining witness had engaged in sexual intercourse within twelve hours prior to the vaginal examination. (RP 425, 426)

After the Defendant was arrested, he did cooperate with the police with respect to voluntarily furnishing samples of hair from various parts of his body upon request. He was then read his Miranda rights and remained silent. Over the objection of the Defendant, the prosecution brought out this fact of "Miranda warning" silence in cross-examination and upon rebuttal, and by commenting on the same in closing argument. (RP 534-536, 545, 546, 549-551 and Supp. Vol. VII, p. 87, 92, 93, 95, 108).

E. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED:

1. The decision of the Court of Appeals is in conflict with decisions of the United States Supreme Court.

2. This case involves a signficant question of law under

the Constitution of the State of Washington and under the Constitution of the United States.

3. This case involves an issue of substantial public interest which should be determined by the Supreme Court.

1. *Exclusion of Evidence:*

The Defendant denied having sexual intercourse with the complaining witness. The trial court refused to allow any interrogation of the complaining witness with respect to prior acts of sexual intercourse. Additionally, the court refused to allow the introduction of any evidence whatsoever with respect to sexual intercourse other than the complaining witness' accusation of intercourse with the Defendant. The court maintained this position notwithstanding the fact that the Defendant's evidence established that the sperm found in the complaining witness in all likelihood deposited there prior to the time the Defendant was with her. The trial court held that this evidence was inadmissible by virtue of the provisions of RCW 9.79.150. The Court of Appeals held that the trial court was incorrect in its reason for the exclusion of this evidence, but held that the evidence was inadmissible due to relevancy.

The Fifth Amendment to the United States Constitution provides, in part, that no person shall be deprived of life, liberty or property without due process of law. The Sixth Amendment of the United States Constitution provides, in part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;"

These Constitutional rights are applicable to states by reason of the Fourteenth Amendment to the United States Constitution. These rights likewise have been guaranteed to the citizens of this State by the Tenth Amendment to the Washington State Constitution.

Bonner v. Beto, 373 F.2d 301 (5th Cir. 1967) involved a case in which the Defendant Bonner and his wife were indicted separately in the state courts of Texas for the same burglary. Immediately prior to Bonner's trial, his wife pleaded guilty and was given probation. When Bonner attempted to call his wife as a witness at trial, the state trial judge refused to allow her to testify because of Article 711 of the Texas Code of Criminal Procedure, which declared co-principals incompetent to testify for a principal.

On review, the Federal Court stated in part as follows:

> "The Fourteenth Amendment leaves Texas free to adopt whatever statute or decision she elects concerning the competency of various classifications of witnesses to testify, whether or not her rule conforms to that applied in the Federal Courts or in other state courts. But as the Supreme Court said in *Lisenba v. People of the State of California*, 315 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941), '(T)he adoption of the rule of her choice cannot foreclose inquiry as to whether, in

> a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. 314 U.S. at 236, 62 S.Ct. at 290.
>
> The district court held that because the testimony of Bonner's wife was self-serving, its prohibition was a reasonable policy and was consistent with the Fourteenth Amendment. We disagree and view the determination of the credibility of a witness' testimony as a function of the jury.
>
> We hold that the application of Article 711 of the Vernon's Ann. Texas Code of Criminal Procedure to Bonner worked a deprivation of his liberty without due process of law under the Fourteenth Amendment."

Bonner, 373 F.2d 301, at 304.

The Federal court then proceeded to reverse the judgment of the Texas district court and to remand the cause with directions giving the State of Texas a reasonable time within which to grant a new trial to the Appellant Bonner, and failing the grant of a new trial, directing that a writ of habeas corpus would be issued.

Smith v. Illinois, 390 U.S. 129, 19 L.Ed. 2d 956, 88 S.Ct. 748 (1968) involved a case wherein an informant who alleged he had purchased a bag of heroin from the defendant identified himself on direct examination as "James Jordan", which was a fictitious name. The Court sustained the prosecution's objection to the questions requiring the witness to disclose his true name and address.

On review, the United States Supreme Court noted, in part:

"In *Pointer v. Texas*, 380 U.S. 400, 403, this Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a 'fundamental right . . . made obligatory on the States by the Fourteenth Amendment.'"

Smith v. Illinois, supra, 390 U.S. at 129.

The Court stated:

"As the Court said in *Pointer*, "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.' 380 U.S., at 404. Even more recently we have repeated that a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1, 3."

Smith v. Illinois, supra, 390 U.S. at 131.

The United States Supreme Court then concluded and held that the defendant/petitioner had been deprived of a right guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution and reversed the trial court.

Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1973), involved a state court's granting of a protective order in favor of a prosecution witness preventing any reference to the prosecution witness' juvenile record by the defense in the course of cross-examinationfl The state trial court granted the motion for a protective order in reliance upon Alaska Rule of Children's Procedure 23, and Alaska

Statutes Section 47510.080(g). The Supreme Court stated in part as follows:

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). Professor Wigmore stated:

'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' 5 J. Wigmore, Evidence § 1395, p. 123 (3d. ed. 1940.) (Emphasis in original.)

Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a gen-

eral attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' "

Davis v. Alaska, supra, 415 U.S. at 316-16.

With respect to Alaska's claim of that state's interest in protecting the anonymity of juvenile defenders, the Supreme Court commented:

"The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault,* 387 U.S. 1, 25 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

In *Alford v. United States, supra,* we upheld the right of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as 'given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States.' 282 U.S., at 693. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the court stated:

"(N)o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitution protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.' Id., at 694.

As in *Alford,* we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refrain-

ing from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records."

Davis v. Alaska, supra, 415 U.S. at 319-20.

The Supreme Court then reversed the conviction of petitioner Davis.

The Sixth Amendment secures more than the mere physical attendance of a witness at a trial. *Washington v. Texas,* 388 U.S. 14 (1967) involved the constitutionality of a Texas statute which provided in effect that persons charged or convicted as co-participants in the same crime could not testify for one another, although there was no bar to their testifying for the state. The Court in deciding the case states at page 23, in part as follows:

"We hold that the petitioner in this case was denied his rights to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed."

State v. Gray, 64 Wn.2d 979, 395 P.2d 490 (1964) involved a prosecution for murder in the second degree. The attack

resulting in death occurred on September 7, 1962. The prosecution over the objection of the defendant introduced evidence from the defendant's former wife as follows: that she had married him in February, 1960 and divorced him in January, 1962; that prior to their marriage, she had frequently seen the defendant in possession of a knife several time after the divorce: and that she had last seen the knife in April or May, 1962 in the back of the defendant's radio. The Court held that the admissibility of this evidence was within the discretion of this trial court and that the trial court had not committed error. The case of *State v. Harold,* 45 Wn.2d 505, 275 P.2d. 895 (1954) involved a trial and conviction of carnal knowledge. Among the errors assigned by the defendant was the admission of testimony prior to acts of intercourse. The Court states in part at page 510 as follows:

"Such testimony is admissible to show lustful disposition toward her. *State v. Crowder,* 119 Wash. 450, 205 Pac. 850. While Appellant concedes that this is the law, he contends that the prior acts relied on are too remote to have any probative value. In *State v. Stevenson,* 169 *Wash.* 10, 13 P. (2d) 47, we said that the question of excluding evidence because or remoteness rests largely in the sound discretion of the trial court, and the rulings of that court not be disturbed unless the evidence offered was so remote in point of time as to be immaterial. Ordinarily, remoteness affects the weight, rather than the admissibility of the evidence."

In discussing the question of materiality, the Court in

State v. Gray, 3 Wash. App. 146, 473 P.2d 189 (1970) states at page 149-150, in part, as follows:

> "The issue of materiality must be determined not just on the item of evidence alone, but on the basis of whatever inferences were made from it when it was viewed in connection with other evidence in the case. The cogency and degree to which it elucidates the facts in issue determine the weight to be given it by the trier of the fact."

In the instant case, the trial court subordinated Appellant Cosden's right as guaranteed by the applicable provisions of the State and Federal Constitution to what the trial court determined to be the interest of the prosecuting witness in avoidance of personal embarrassment to her. The Court of Appeals by its opinion improperly invades the provence of the jury with respect to determinations of fact and preserves the trial court's error of denying the Appellant his constitutional rights to confront the witnesses presented against him. The opinion of the Appellate Court notes that the "Defendant was not precluded from contending that Dr. Wilson's opinion evidenced collaborated his defense." However, without admission of the critical evidence, the Appellant was left in the position of rowing his own boat across the lake with only one oar.

2. *Prosecution's Comment on Defendant's Silence After Arrest*

After the Defendant was arrested, he was read his Miranda rights and remained silent. Over objection of the Defendant, the Prosecution brought this fact out on cross-examination and rebuttal, and commented upon it in closing argument. Defendant submits that this conduct is a violation of his rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

Doyle v. Ohio, 426 U.S. 610, 49 L. Ed.2d 91, 96 S.Ct. 2240 (1976) involved the question of whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examination of the defendant concerning his failure to have told the story after receiving the Miranda warnings at the time of his arrest. The Court, in discussing the matter, states as follows:

> "Despite the importance of cross-examination, we have concluded that the Miranda decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendments rights, see *Michigan v. Tucker*, 417 U.S. 433, 443-444, 41 L.Ed.2d 182, 94 S.Ct. 2357 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of, what the State is required to advise the person arrested. See *United States v. Hale*, 422 U.S., at 177, 45 L.Ed.2d 99, 95 S.Ct. 2133. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation

of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial Mr. Justice White, concurring in the judgment in *United States v. Hale*, 442 U.S., at 182-183, 45 L.Ed.2d 99, 95 S.Ct. 2133, put it very well:

> '. . . when a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case.'
>
> We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment."

Doyle v. Ohio, supra, 49 L.Ed.2d at 97-98.

The rule of *Doyle, supra*, has resulted in reversal of the conviction of a criminal defendant by this Court in the case of *State v. Upton*, 16 Wn.App. 195, 556 P.2d 239 (1976). In *Upton* as in *Doyle*, the defendant remained silent after receiving the Miranda warning. The prosecuting attorney attempted to cross-examine the Defendant about his post-arrest silence and the fact that he had not asserted the defense raised at the trial after receiving the Miranda warning.

This Court held that, pursuant to *Doyle v. Ohio, supra*, the defendant's rights to due process under the Fourteenth Amendment, were violated when he was cross-examined regarding his post-Miranda warning silence.

It is significant to note that Defendant Upton, once advised of his *Miranda* rights, made a few comments to the arresting officer but failed to mention self-defense, which was the defense asserted by Mr. Upton at trial. In the instant case, the Defendant Cosden similarly made a few comments to the arresting officer after being advised of his *Miranda* rights, but did not advise the officer of his inability to consumate sexual intercourse with the complaining witness because of his impotence. It is not difficult to imagine why an accused in the position of the Defendant Cosden would hesitate to discuss his lack of virility with a law enforcement officer. Yet, the Defendant's very understandable silence became a central theme of the prosecutor's attack, and was used repeatedly and invectively during the prosecutor's final argument. The gravamen of the prejudice to Defendant Cosden is exexplified in two excerpts from the prosecutor's final argument:

> "I submit, ladies and gentlemen, maybe he really hadn't concocted his story yet. That is why he didn't want to tell Detective Barclift anything. The Detective would have seen right through it." (RP Supp. Vol. VII, 95, L. 25-28.)
>
> "Also, remember when he said, when Detective Barclift said the questioning stopped, when he asked what

> time he got home, *he had a chance to tell his story to the detectives. He didn't.* He instead waited until he came to court last week, after listening to everything, having a chance with his attorneys to look at all the written statements of Beverly Fredericks—after listening to all the testimony—and then, and only then, does he come up with this preposterous story. (RP Supp. Vol VII, 92, L. 11-19. Emphasis added.)

The Defendant made timely objection to these remarks (RP Vol. VII, 636, L. 29-30 and 637, L. 1), which objection was overruled by the trial court (RP Vol. VII, 637, L. 7-8).

Clearly, the permitted questioning of Defendant Cosden and the arresting officer concerning the Defendant's post-Miranda warning silence, and the repeated comment thereon by the prosecutor violated the Defendant's rights secured by the Fifth and Fourteenth Amendments to the Federal Constitution and mandate reversal of his conviction and remand for a new trial.

F. CONCLUSION:

This Court should accept review of this Cause and thereafter should reverse the judgment and conviction entered in these proceedings and remand this cause for a new trial.

Respectfully submitted,

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